IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMERE METTS, a minor, by his mother, Kia Smack, MARY KATE BUGBEE, a minor, by her parents, Molly and Todd Bugbee, ANDREA APPLEGATE, a minor, by her parents Laurie and Gerard Applegate, CRYSTAL WILLIAMS, a minor, by her foster mother, Sharlene Wall, DANIEL MILLER, a minor, by his parents, Elizabeth and George Miller, DANIELLE WHITE, a minor by her mother, Marsha White, and SANDRA MITCHELL, individually an on behalf of all others similarly situated	:	CIVIL ACTION
v.	:	
FEATHER O. HOUSTOUN	:	No. 97-4123

MEMORANDUM and ORDER

Norma L. Shapiro, J. October 22, 1997

Plaintiffs are individuals who receive medical assistance services from several health maintenance organizations ("HMOs") under contract with the Department of Public Welfare. They brought this action for declaratory and injunctive relief against defendant Feather Houstoun ("Houstoun"), in her capacity as Secretary of the Department of Public Welfare of the Commonwealth of Pennsylvania. Before the court is plaintiffs' motion for class certification. Because plaintiffs have met the requirements for class certification under Fed. R. Civ. P. 23, plaintiffs' motion will be granted.

FACTS AND PROCEDURAL HISTORY

Plaintiffs are individuals receiving medical assistance services for serious conditions, including cerebral palsy, spinal muscular atrophy, chronic lung disease, and mitochondrial disease. The Medical Assistance ("Medical Assistance") program is a cost-sharing arrangement authorized by Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq. Under this program, the state and federal governments finance Medical Assistance to individuals whose resources are insufficient to cover the costs of their medical care. The Commonwealth of Pennsylvania participates in a particular aspect of Medical Assistance called "HealthChoices" under which these individuals are required to receive nearly all of their Medical Assistance services through HMOs. Participating HMOs are obligated to provide medically necessary services, and to provide timely and adequate written notice required by Medical Assistance and Title XIX of the Social Security Act. Between February, 1997, when the HealthChoices program began, and June, 1997, when this complaint was filed, Medical Assistance services for each plaintiff were terminated, reduced or denied. Plaintiffs allege that the notice provided when the HMOs denied treatment or services was often oral, inadequate, untimely, or lacking sufficient information for the individual to appeal the denial of services. Plaintiffs also allege that they were denied medically necessary services. Plaintiffs filed this action alleging that defendant failed to assure that contracting HMOs provide medically necessary

services, and timely and adequate written notice of decisions affecting the receipt of Medical Assistance services.

Plaintiffs, by motion for class certification, proposed two separate classes:[1]

> Class A: All Pennsylvania residents in Philadelphia, Bucks, Chester, Montgomery, and Delaware counties who receive Medical Assistance services through the HealthChoices program whose Medical Assistance services are terminated, reduced, or denied without timely and adequate written notice informing them of the decision.
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> Class B: All Pennsylvania residents in Philadelphia, Bucks, Chester, Montgomery, and Delaware counties who receive Medical Assistance services through the HealthChoices program whose Medical Assistance services are terminated, reduced, or denied because of defendant's failure to assure the HealthChoices HMOs apply the criteria required by Title XIX of the Social Security Act to determine the medical necessity of the services.

The court held a hearing on the motion for class certification on October 7, 1997.

DISCUSSION

To obtain class action certification, plaintiffs must establish that all four requisites of Rule 23(a) and at least one part of Rule 23(b) are met. Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239 (3d Cir.), cert. denied, 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 679 (1975). Federal Rule of Civil Procedure 23(a) provides that:

> One or more members of a class may sue or be sued as

[1] Plaintiff originally proposed two classes without the phrase "in Philadelphia, Bucks, Chester, Montgomery, and Delaware counties" in either. The parties later filed a stipulation including this phrase in each proposed class definition.

> representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). The plaintiff bears the burden of establishing each of these requirements. See Hutchinson v. Lehman, No. 94-5571, 1995 WL 31616 (E.D. Pa. Jan. 27, 1995); Lloyd v. City of Philadelphia, 121 F.R.D. 246, 249 (E.D. Pa. 1988); see also Anderson v. Home Style Stores, Inc., 58 F.R.D. 125, 130 (E.D. Pa. 1972).

I. NUMEROSITY

Class certification is based on necessity. Rule 23 provides a remedy for situations where plaintiffs are so numerous it is impracticable to bring each member before the court. There is no precise number necessary for class certification. The decision of whether or not to certify a class must be based on the particular facts of each case. See, e.g., Fox v. Prudent Resources Trust, 69 F.R.D. 74, 78 (E.D. Pa. 1975).

"'While the absolute number of class members is not the sole determining factor, generally the courts have found the numerosity requirement fulfilled where the class exceeds 100.'" Ardrey v. Federal Kemper Ins. Co., 142 F.R.D. 105, 109 (E.D. Pa. 1992) (quoting Fox, 69 F.R.D. at 78); see Kromnick v. State Farm Ins. Co., 112 F.R.D. 124, 127 (E.D. Pa. 1986).

"The numerosity test is one of practicability of joinder."

Ulloa v. City of Philadelphia, 95 F.R.D. 109, 115 (E.D. Pa. 1982). Factors in evaluating impracticability of joinder are: 1) the size of the putative class; 2) the geographic location of the members of the proposed class; and 3) the relative ease or difficulty in identifying members of the class for joinder. See Ardrey, 142 F.R.D. at 110 (citing Andrews v. Bechtle Power Corp., 780 F.2d 124, 131-32 (1st Cir. 1985), cert. denied, 476 U.S. 1172 (1986); Kilgo v. Bowman Trans., Inc., 789 F.2d 859, 878 (11th Cir. 1986)); MacNeal v. Columbine Exploration Corp., 123 F.R.D. 181, 185 (E.D. Pa. 1988).

The size of this class favors certification. Classes comprised of as few as twenty-five members have been certified. See Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 459 (E.D. Pa. 1968). The proposed classes exceed this number. The first class includes at least sixty-four members, and could comprise several hundred. (Declaration of Ilene Shane in Support of Plaintiffs' amended motion for class certification, ¶ 3.) The second class likely exceeds one hundred members.

Geographical diversity favors class certification. See Garcia v. Gloor, 618 F.2d 264, 267 (5th Cir. 1980) (denying certification because the 31 proposed class members all worked for the same company and lived in "a compact geographical area"), cert. denied, 449 U.S. 1113 (1981); Browne v. Sabatina, No. 89-1228, 1990 WL 895, at *1 (E.D. Pa. Jan. 5, 1990) (Shapiro, J.) (denying certification of 57 member class because the members all lived in "the same area of Philadelphia"). Here, the class

members are found in the five counties of Eastern Pennsylvania in which the Department of Public Welfare has instituted the HealthChoices program. Since this action challenges provision of services under that program, it is appropriate to extend the class to all of those counties (Philadelphia, Bucks, Chester, Montgomery, and Delaware). When "potential class members are located throughout a number of counties . . . joinder . . . would be impracticable." Gentry v. C & D Oil Co., 102 F.R.D. 490, 493 (W.D. Ark. 1984). Because "members of the class are from [a sufficiently] disparate geographical area[]" it would be difficult to join all the members. Wilcox, v. Petit, 117 F.R.D. 314 (D. Me. 1987)(citing Andrews v. Bechtel Power Corp., 780 F.2d 124, 131-32 (1st Cir. 1985)).

If the class members cannot easily be identified, certification is appropriate. See Ardrey, 142 F.R.D. at 110; Westcott v. Califano, 460 F. Supp. 737, 745 (D. Mass. 1978) aff'd, 443 U.S. 76 (1979). It is possible but difficult to identify and join each participant in the program whose services have been terminated, reduced, or denied. Plaintiffs have met the requirement of numerosity under Fed. R. Civ. P. 23(a)(1).

II. COMMONALITY AND TYPICALITY

Rule 23(a) also requires the proposed representative to show "questions of law or fact common to the class," Fed. R. Civ. P. 23(a)(2), and claims "typical" of the class. Fed. R. Civ. P. 23(a)(3). "Although Rule 23 establishes these two prerequisites as separate and distinct, the analyses overlap, and therefore

these concepts are often discussed together." Hassine v. Jeffes, 846 F.2d 169, 176 n.4 (3d Cir. 1988); see Droughn v. F.M.C. Corp., 74 F.R.D. 639, 642-43 (E.D. Pa. 1977). Both requirements:

> serve as guideposts for determining whether under particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. General Tele. Co., 457 U.S. at n. 13.

The inquiry is whether there is potential conflict between claims of the representatives and other class members. See Eisenberg v. Gagnon, 766 F.2d 770, 786 (3d Cir.), cert. denied sub nom., Weinstein v. Eisenberg, 474 U.S. 946 (1985) (citing Weiss v. York Hosp., 745 F.2d 786, 809 n.36 (3d Cir. 1984), cert. denied, 470 U.S. 1060 (1985)).

Defendant's alleged breach of duty is common to all proposed class members; "demonstrating that all class members are subject to the same harm will suffice" to meet the commonality requirement. Baby Neal v. Casey, 43 F.3d 48, 56. Plaintiffs allege that Houstoun has not assured that HMOs perform their contractual obligations, comply with the requirements of Title XIX of the Social Security Act, and provide adequate notice to Medical Assistance recipients under the HealthChoices program.

> Commentators have noted that cases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims. Baby Neal v. Casey, 43 F.3d at 58 (citing H. Newberg & A. Conte, 1 Newberg on Class Actions § 3.13 (1992) (hereinafter Newberg & Conte).)

Regardless of the differing factual ways in which Houstoun's

alleged breach affected the proposed class members, they challenge the same conduct. The burden of establishing commonality or typicality between the claims of the proposed class representatives and the class members has been met. See Fed. R. Civ. P. 23(a)(2)-(3).

III. ADEQUACY

The named class members must "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The adequacy requirement focuses on whether the named plaintiff has "the ability and the incentive to represent the claims of the class vigorously, that he or she has obtained adequate counsel, and that there is no conflict between the individual's claims and those asserted on behalf of the class." Hassine, 846 F.2d at 179; see General Tele. Co., 457 U.S. at 157 n.13.

The members of the class share the same alleged injuries as a result of defendant's actions. No conflict of interest appears to exist between the named representatives and other members of the class. The first class seeks to force Houstoun to assure that the HMOs will provide adequate notice. The second class seeks to have Houstoun assure that the HMOs will provide medically necessary services. Because the plaintiffs seek the same injunctive relief as all members of the class, the court "can find no potential for conflict between the claims of the complainants and those of the class as a whole." Hassine v. Jeffes, 846 F.2d 169, 179 (3d Cir. 1988). Nevertheless, in order to avoid any potential for conflict between the two classes, the

court will certify Jamere Metts, Mary Kate Bugbee, Andrea Applegate, and Crystal Williams as named representatives for Class A; and Daniel Miller, Danielle White, and Sandra Mitchell as named representatives for Class B. Since the named representatives are each members of the respective classes, they will adequately protect the interests of the class.

Plaintiffs' counsel is adequate. See Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 247 (3d Cir.) ("[T]he plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation ...."), cert. denied, 421 U.S. 1011 (1975). While plaintiffs' counsel seeks to represent two classes, there appear to be no conflict of interest that would disqualify them from representing both. See BML Group, Inc. v. U.S. Pizza, Inc.,1992 WL 114958 at *2-*3 (E.D. Pa. 1982) (refusing to disqualify a firm representing both the plaintiffs and the employer of one of the defendants because "any limiting effect seems slight and does not rise to the level of a material limitation.")(quotations omitted), Reynolds v. National Football League, 584 F.2d 280, 286 (8th Cir. 1978) (theoretical conflicts of interest do not require disqualification of counsel).

IV. Rule 23(b) Requirements

In addition to requirements of Rule 23(a), plaintiffs must also satisfy one of the requirements of 23(b):

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
> . . .
> (2) the party opposing the class has acted or refused to act

> on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole[.] Fed. R. Civ. P. 23(b)(2).

Actions primarily seeking injunctive relief almost automatically satisfy this requirement. "When a suit seeks to define the relationship between the defendant(s) and the world at large, ... (b)(2) certification is appropriate." Weiss, 745 F.2d at 811. This language of (b)(2) does not require that the defendant's conduct be directed or damaging to every member of the class. See 1 Newberg & Conte § 4.11, at 4-37.

Fed. R. Civ. P. 23(b)(2) aims to prevent prejudice to absentees by mandating the putative class "demonstrate that the interests of the class members are so like those of the individual representatives that injustice will not result from their being bound by such judgment in the subsequent application of principles of res judicata." Hassine, 846 F.2d at 179. Injunctive actions, seeking to define the relationship between the defendant and the "world at large," will usually satisfy this requirement.

Fed. R. Civ. P. 23(b)(2) is most commonly invoked in civil rights actions and other institutional reform cases receiving class action treatment. The plaintiffs assert that Houstoun has failed to assure that the contracting HMOs perform their contractual obligations and provide timely and adequate notice to participants in the HealthChoices program. The action is for injunctive relief, based on Houstoun’s alleged failure to act on

grounds applicable to the class as a whole. The requirement of Fed. R. Civ. P. 23(b)(2) is satisfied.

CONCLUSION

The two proposed classes meet the requirements of numerosity, commonality, typicality, and adequate representation of Fed. R. Civ. P. 23. They also meet the requirement of Fed. R. Civ. P. 23(b)(2) by alleging Houstoun's failure to act on grounds generally applicable to the class as a whole. So long as the classes have separate class representatives, they may be represented by common counsel. The court will certify the classes proposed in the stipulation.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMERE METTS, a minor, by his mother, Kia Smack, MARY KATE BUGBEE, a minor, by her parents, Molly and Todd Bugbee, ANDREA APPLEGATE, a minor, by her parents Laurie and Gerard Applegate, CRYSTAL WILLIAMS, a minor, by her foster mother, Sharlene Wall, DANIEL MILLER, a minor, by his parents, Elizabeth and George Miller, DANIELLE WHITE, a minor by her mother, Marsha White, and SANDRA MITCHELL, individually an on behalf of all others similarly situated	:	CIVIL ACTION
v.	:	
FEATHER O. HOUSTOUN	:	No. 97-4123

ORDER

AND NOW, this 22nd day of October, 1997, upon consideration of plaintiffs' motion for class certification, defendants' response thereto, after a hearing in which counsel for both parties were heard, and for the reasons stated in the attached Memorandum, it is hereby **ORDERED** that plaintiffs' Motion for Class Certification under Fed. R. Civ. P. 23(b)(2) is **GRANTED**; the following classes are certified:

> Class A: Jamere Metts, Mary Kate Bugbee, Andrea Applegate, and Crystal Williams, on behalf of all Pennsylvania residents in Philadelphia, Bucks, Chester, Montgomery, and Delaware counties who receive Medical Assistance services through the HealthChoices program whose Medical Assistance services are terminated, reduced, or denied without timely and adequate written notice informing them of the decision.
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> Class B: Daniel Miller, Danielle White, and Sandra Mitchell on behalf of all Pennsylvania residents in Philadelphia, Bucks, Chester, Montgomery, and Delaware counties who receive Medical Assistance services through the HealthChoices program whose Medical Assistance services are terminated, reduced, or denied because of defendant's failure to assure the HealthChoices HMOs apply the criteria required by Title XIX of the Social Security Act to determine the medical necessity of the services.

Norma L. Shapiro, J.